a

**AWG MUHAMMAD MAWARDI MD ROSLI**

**v.**

**LIMAS AHMAD & ANOR**

b

HIGH COURT OF BRUNEI DARUSSALAM
BEWLEY J
[CIVIL SUIT NO: 40 OF 1990]
7 SEPTEMBER 1996

c ***EVIDENCE:*** *Previous conviction - Admissibility of - Whether defendant's prior conviction on charge of careless driving admissible in civil case for damages*

***DAMAGES:*** *Personal injuries - Osteoarthritis - Inability to walk much - Loss of amenity - Pain when carrying heavy loads - Pain and suffering*

d The plaintiff claimed damages for injuries received in a motor accident in 1987 involving his car and a car driven by the 1st defendant and owned by the 2nd defendant. It was not disputed that the 1st defendant had swerved into the path of the plaintiff's oncoming car, causing the collision. It was raining heavily and the road was wet. The 1st defendant elected to give evidence and said that another car had cut in front of him, causing him to swerve to avoid e it but due to the weather and road condition, the car had spun out of control and onto the path of the plaintiff's car. However, the existence of this third car was not pleaded in the 1st defendant's defence. The 1st defendant had earlier been charged with careless driving, to which he had pleaded guilty on 3 August 1987. He had also admitted to losing control of the car so that it f encroached onto the opposite lane and collided with the plaintiff's car.

The medical evidence adduced on the plaintiff's behalf showed that the plaintiff suffered from continuing osteoarthritis of the hip and knee resulting from the accident. He felt pain when carrying heavy loads and was also unable to walk much. At the date of trial, the plaintiff was aged 60 years.

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**Held:**

**[1]** The 1st defendant's admission of guilt to the charge of careless driving was admissible evidence but carried little weight in view of the fact that he was not represented at that time.

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**[2]** It was unlikely that the 1st defendant's car would have spun out of control for no apparent reason as there was no allegation of excessive speed. It was thus probable that there was another car involved. However, the Court rejected the 1st defendant's version of how the accident happened as his

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statements were contradictory. The omission of any reference to the third car in his defence was also an indication that there was no substance to his claim that the third car was the substantial cause of the accident. In the absence of other evidence, the 1st defendant's admitted loss of control was negligent and there being no contributory negligence on the plaintiff's part, the 1st defendant was 100% liable.

**[3]** The case law on quantum of damages for personal injuries in Singapore and Malaysia although not useful to provide an assessment, as they did not bear much resemblence to the present one, did give a general indication of the level of awards for such injuries over the past decade. However, allowance was to be made for inflation.

**[4]** The plaintiff had made a good recovery and at his age, it would not be much of a hardship not to be able to carry heavy loads. For his arthritic pain, however, he was awarded $11,000 for pain and suffering. Walking is one of man's main physical recreations, and that was an amenity that the plaintiff could no longer enjoy. For this loss of amenity, he was awarded $4,000.

*[Claim allowed.]*

**Cases referred to:**
*Bird v. Cocking & Sons Ltd [1951] 2 TLR 1260* ***(cit)***

**Legislation referred to:**
Evidence Ordinance [Brunei], s. 157

*For the plaintiff - David Clidero; M/s David Clidero & Co*
*For the 1st defendant - In person*
*For the 2nd defendant - In person*

*Reported by Anne Khoo*

## JUDGMENT

**Bewley J:**

The plaintiff, who is represented by Mr. Clidero, claims damages for injuries received in a motor car accident as long ago as April 1987. Interlocutory judgment was entered against the 2nd defendant – the owner of the other car – on 3 October 1990. The driver was originally represented by Daud Ismail & Co., who filed a defence on his behalf. He now appears in person.

There is no dispute that an accident took place between the plaintiff's car BF 9912 and the car driven by the 1st defendant BB 2672 at 7.30 am on 5 April 1989, at mile 1½, Jalan Kumbang Pasang.

The 1st defendant made a statement to the police later that day, in which he said that a car had suddenly appeared in the nearside lane and had then switched lanes, causing him to brake and swerve to the right into the path of the plaintiff's car. The road was slippery and it was raining very heavily.

On 3 August 1987, the 1st defendant pleaded guilty to careless driving in the magistrate's court. The facts, which he admitted, alleged that he lost control of his car, so that it encroached into the opposite lane and collided with BF 9912.

Mr. Clidero tendered a statement made by the plaintiff on 8 April 1987, under s. 157 of the Evidence Ordinance. It says he was driving towards Bandar Seri Begawan in heavy rain when he saw a red car coming towards him. He braked and swerved to the right, but could not avoid a collision.

The plaintiff confirmed this statement in the witness box. He said there was not much traffic. His speed was 30 mph. The other car was on the wrong side of the road. He braked and swerved, but to no avail. He was taken to hospital in a semi-conscious condition.

The 1st defendant, in reply to a question from the bench when he failed to cross-examine the plaintiff, said he accepted that the plaintiff's account of how the accident happened was correct.

Nor does the 1st defendant challenge the medical evidence. The first report by Mr. Atun Wee, Specialist Orthopaedic Surgeon at RIPAS Hospital, is dated 18 July 1989. It states that the plaintiff suffered a fracture of the right tibial tubercle and a fracture dislocation of the right hip. He was discharged from hospital on 9 June 1987. When seen on 23 June 1987, there was limitation of movement of both the right hip and the right knee. By 13 October 1987, the fractures had heeled fully, but Mr. Harris, who had been treating him, considered that the muscles needed physiotherapy. He continued this treatment until 1989.

On 30 May 1989, Mr. Atun Wee assessed his degree of permanent disability to be 30% of a normal person of the same age. Flexion of the knee and hip both reached only 110 degrees. The plaintiff complained of pain when walking a lot, or carrying heavy articles. This was caused by osteoarthritis of the hip and knee resulting from the accident.

Mr. Atun Wee saw the plaintiff again on 29 September 1989. His report states:

> His condition remains virtually the same, if anything slightly improved.
>
> He still gets pain when having sat down for sometime, gets up again. Often the knee virtually locks until it is loosened up by flexion/extension movement. There is no muscle wasting which means he is still able to use the limb relatively well.
>
> He no longer works and this explains the limitation of deterioration.
>
> The general outlook for future situation as regards disability remains as they were in 1989.

The plaintiff, who is now 60, says he still feels pain. He was not in pain as he gave his evidence – sitting down – but his leg feels numb when the weather is cold. He also feels pain when he carries heavy loads. He cannot bend his knee, which is a handicap. Nor can he walk as often as he would like. He walked a lot before the accident. He still does exercises, but no physiotherapy.

Evidence was given by Hj. Tusin bin Hj. Abdullah Ghani, a former police sergeant who retired last year. Although he no longer has his police notebook, he remembers going to the scene of the accident and there making a sketch and taking measurements on 5 April 1987. The 1st defendant was still there and he took a statement from him later the same day. He also took a statement from the plaintiff on 8 April.

The 1st defendant elected to give evidence, but called no witnesses. He had no dispute with the plaintiff's evidence, but said another car was involved. He had been driving towards Gadong. He was rounding a bend in the outside lane at about 40 mph. The other car had been level with him in the nearside lane for some distance. Suddenly this car cut in front of him. He braked and swerved to the right to avoid it but, the road being wet and slippery, his car spun out of control into the path of the plaintiff's car. He admitted that he panicked at the other car's manoeuvre.

In cross-examination the 1st defendant admitted giving an account of the accident to his lawyer, Mr. Daud. He cannot recall what he said: he had answered questions. He does not recall if he mentioned the other car – which is not referred to in the defence filed by Daud Ismail & Co., and which puts all the blame on the plaintiff. He did not tell Mr. Daud that the accident was the plaintiff's fault.

The 1st defendant admitted pleading guilty to careless driving and to admitting the facts of the case as stated in the magistrate's record. He agreed that he did not mention the other car: this was because he was only asked to plead to the charge.

Mr. Clidero does not ask me to draw any adverse inference from the conviction itself, but he relies on the admitted facts as an admission of negligence. The evidence is clearly admissible but, in my judgment, it carries little weight. The 1st defendant was not represented. The facts, from the prosecution's point of view, were accurate and are consistent with the 1st defendant's case. He, I daresay, was more concerned about the imminent fine than the need to apprise the magistrate of the full circumstances of the accident: his mitigation was limited to pointing out that he was a first offender. Moreover, less than an hour after the accident, he told Sgt. Tusin about the other car in terms similar to his evidence in this Court.

I think it probable that there was another car. It is unlikely, there being no allegation of greatly excessive speed, that the 1st defendant's car spun as described for no reason. But I do not believe that the accident happened as narrated by the 1st defendant.

If the other car was keeping pace with him at 40 mph in the nearside lane, as he says, and if it then accelerated and cut in front of him, which is his case, it would have posed a threat only had it suddenly braked. The 1st defendant does not mention that. Nor did he tell that to Sgt. Tusin. In fact his evidence contradicts his police statement, which says that the other car 'suddenly' appeared.

Furthermore, it is significant that this allegation does not appear in the defence. As the 1st defendant says, he was questioned by his lawyer about the accident. The omission of any reference to a third car is further indication that there is no substance in his claim that its cutting in front of him was the substantial cause of the accident.

In the absence of other evidence, I find that the admitted loss of control by the 1st defendant was negligent. There was no contributory negligence on the part of the plaintiff. I find that the 1st defendant was 100% responsible for the accident.

Mr Clidero has cited a great many Singapore and Malaysian authorities on quantum. None of these cases bears much resemblance to the present one. I do not think it is useful to extract an assessment for a particular injury, removed from the context of the award as a whole. The only assistance provided by these cases is that they give a general indication of the level of awards for such injuries over the past decade. I bear in mind, in this connection, that I must make due allowance for inflation.

The plaintiff must have suffered a great deal at the time and during the post-operative period. But he has made a good recovery. He now has no limp. Even after leaving the witness box, there was no indication that his knee had locked. He admitted that he was not in pain as he gave his evidence. Attacks of numbness, due to cold weather, should not be very frequent in Malacca, where he lives. Nor do I consider it much of a hardship, at his age, that he cannot carry heavy loads without pain. He can, however, never be free from arthritic pain. I would award $11,000 for the plaintiff's pain and suffering.

His principle loss of amenity is that he can no longer do so much walking. At the age of 60 walking is one of a man's main physical recreations, particularly if that man has led an active life. But I bear in mind that an award for loss of amenities must be discounted to take into account the age of the plaintiff. See *Bird v. Cocking & Sons Ltd.* [1951] 2 TLR 1260. 1 award $4000 under this head.

The claim for special damages has been abandoned. There will be judgment for the plaintiff against both defendants in the sum of $15,000, with costs to be taxed. The damages will carry interest at the rate of 6% from 17 May 1990, until payment.